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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 985

GRANT W. SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for Writ of Certiorari

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Petition for Writ of Certiorari

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on February 27, 1958.

OPINION OF COURT BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported; the unreported opinion is included herein as Appendix I.

STATEMENT OF JURISDICTION.

The judgment of the United States Court of Appea for the Seventh Circuit, in this matter, was entered February 27, 1958; a petition for rehearing was filed petitioner within the proper time, as provided for rule of said Court of Appeals, and the order denying sa petition for rehearing was entered April 8, 1958. T Jurisdiction of the Supreme Court of the United States invoked pursuant to Title 28 U.S.C. § 1254(1).

QUESTION PRESENTED.

Whether the petitioner was accorded a trial by jur which was truly representative of the State and distric wherein the crime was committed where the Clerk of th United States District Court for the Northern District o Illinois, who by law chooses fifty percent of all person to be called for jury service, testified at the hearing o the petitioner's challenge to the array of the petit jury that fifty to sixty percent of all names of persons whic he deposited in the jury box were taken from name recommended by other jurors or were volunteers; that the remainder were taken: from names recommended by postmasters in the district and by members of the United States Attorney's office and other persons employed in the Federal Court House; from a list of members of the St. Kilian Society given to him by a deputy clerk; a list of parents of pupils in a parochial school; lists furnished him by his secretary; and lists of parent teachers associations furnished by his wife.

STATUTES.

Constitution of the United States
Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . .

United States Code
Title 28, § 1861:

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.

Illinois Revised Statutes (1957)
Chapter 78, § 13:

. . . Any person who seeks the position of a juror, or who asks any attorney or other officer of the court or other person to secure his selection as a juryman, shall be deemed guilty of a contempt of court, and be fined not exceeding twenty dollars ($20), and shall thereby be disqualified from serving as a juror for sixty days thereafter, and such fact shall be sufficient ground for challenge . . .

STATEMENT OF THE CASE.*

The March, 1957, Grand Jury of the Northern District of Illinois, Eastern Division, returned an indictment against Grant Smith, defendant, in which he was charged in two counts with violation of Section 2422, Title 18, United States Code, commonly described as White Slave Act. Both counts are the same except that they relate to acts which occurred on two dates to-wit: January 31, 1957, and February 28, 1957. The indictment charges that Grant Smith, defendant, knowingly persuaded, induced, enticed and coerced a woman, one Mae Frances Young, also known as Faye Jackson, to go from Chicago, Illinois, to Waynesville, Missouri, for the purpose of prostitution, debauchery and other immoral purposes, and thereby knowingly caused said woman to go and to be carried and transported as a passenger upon a common carrier in interstate commerce from Chicago, Illinois, to Waynesville, Missouri, in violation of Section 2422, Title 18, United States Code.

The defendant was tried by a jury and was found guilty of the charges contained in the indictment. The motion for a new trial was denied and the defendant was sentenced to the custody of the Attorney General for a period of five years, upon each Count, the sentences to run concurrently.

An appeal was taken to the United States Court of Appeals for the Seventh Circuit which reversed the conviction under Count 1 and affirmed the conviction under Count 2 of the indictment.

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*The letter "R," followed by a number, refers to the pages of Appellant's Appendix as prepared for use in the United States Court of Appeals for the Seventh Circuit.

Motion challenging the array.

A motion was made prior to the trial challenging the array of the petit jury. (R. 3) The affidavit in support of a motion challenging the array of the petit jurors (R. 6-10) stated (1) that 65% of the names of prospective jurors are obtained by recommendations of former jurors; (2) that Roy Johnson, Clerk of the United States District Court, during the years 1954, 1955, 1956, did not address any communication to any person, corporation, or organization with reference to securing names of persons for jury service other than 3 churches and four small town postmasters; (3) that some of the prospective jurors whose names are deposited in the jury box were recommended by persons in the United States Attorney's office in this district; (4) that the array of petit jurors do not constitute a fair representative cross section of the community; (5) that the officials in charge of the jury selection procedure utilized methods in the selection of the petit jurors whereby they arbitrarily, intentionally or systematically excluded various classes of people who are eligible and qualified for general jury service; (6) that the officials in charge of the jury selection procedure of this court illegally and improperly delegated their duties in connection with the selection of the petit jurors; (7) that the population of the Northern District of Illinois exceeds six million persons, but that since 1950 and at the present time, jury panels are selected from a list of prospective jurors never exceeding two thousand names. The government did not file an answer to this affidavit.

Roy Johnson, Clerk of the United States District Court, testified at the hearing on the motion challenging the array of the petit jury. The other jury commissioner, Harry Crooks, was ill and did not testify. Johnson testified that he and Crooks placed in the jury box an equal number of names of prospective jurors (R. 12). During the year,

1956, the only requests he made for names of prospective jurors were directed to three or four Negro churches and some postmasters of the district (R. 12). He received forty or fifty names from the Negro churches (R. 12), one hundred to two hundred names from the postmasters (R. 36), and perhaps five hundred names of persons recommended by previous jurors (R. 12). He also obtained names from a list of the St. Kilian Society brought in by a deputy clerk, a list of parents of pupils in a parochial school, lists given to him by his secretary, and lists, furnished by his wife, of parent teachers associations (R. 12).

Johnson testified that he received several thousand questionnaires during the year, 1956, but did not know exactly how many. In 1956, there were deposited in the jury box the total of 1934 names. On April 8, 1957, and on May 8, 1957, there were deposited 450 and 514 names respectively. At the time he drew the panel for the petit jurors for the month of June, in which the present case was tried, he also drew the grand jury panel. There were only 1402 names in the box at the time he made the drawings of names of jurors for service during the month of June (R. 12).

Johnson further testified that fifty to sixty per cent of all jurors' names he deposited in the jury box were taken from names recommended by other jurors or by friends, people around the building, and volunteers (R. 13). He testified that three jurors were recommended by the members of the United States Attorney's office, two of them during 1957 (R. 13).

In 1957, he wrote to four Negro organizations, including 3 churches. The jurors selected to serve for the month of June were drawn on May 15, 1957, and they came from the same source that he had described for the

year, 1956. He did not write to churches having white membership (R. 13). He did not know whether he wrote to any postmasters for names from January 1st, 1957 to May 15th, 1957. The names of jurors drawn to serve for the month of June, 1957, were drawn from the names he had deposited as his half of the total number (R. 13).

On cross examination, he testified that he did not systematically or intentionally exclude any economic, social, religious, racial, political, or geographical group. He did say, however, that he did not have sufficient clerical help to take names from polling lists and directories (R. 13).

Under the questioning of the court, he testified that over the past twenty five years, as Clerk of the United States District Court, he had written to Catholic, Jewish and Protestant Churches, labor unions, veteran organizations, parent teacher associations, women's clubs, rotaries, Lions, Elks and Odd Fellows. He had always written to postmasters in the outlying counties. He had also written to officers of labor unions (R. 13). When he was asked whether he had received answers, he made the following reply:

"Well, over the years I have had answers from some of all of those organizations. That is, some of the labor unions, some of the pastors answered. There are some who don't answer. I don't write again. I write once, and if they don't answer, that is it, except the Chicago Urban League. I have written to them several times" (R. 13).

The Court, at the conclusion of the hearing, overruled the motion challenging the array (R. 3, 14).

BASIS FOR FEDERAL JURISDICTION.

The proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, were instituted by indictment, returned by the Grand Jury in and for said District and Division, against the petitioner for violation of Title 18 U.S.C. § 2422.

REASONS FOR GRANTING WRIT.

The defendant was deprived of a jury selected from a truly representative group of the community as guaranteed to him by the Sixth Amendment to the Constitution of the United States.

The testimony of Roy Johnson, Clerk of the United District Court, that in 1956 and 1957 he communicated with only three and four Negro churches respectively and some postmasters in the district to obtain names for jury service; that forty percent of the jurors whose names he chose were selected from a list of parents of pupils of a parochial school, unidentified lists made by his secretary; and lists of parent teachers groups furnished by his wife; and that the remainder of the jurors where chosen from recommendations of previous jurors, postmasters and volunteers does not show regard for the established concept of trial by jury.

It would thus appear that unless one belonged to a particular association favored by the clerk, or was recommended by a former juror or a postmaster, or volunteered for jury service, he would not be called. The clerk in following the methods we have called to the attention of this court excluded from jury service the overwhelming majority of the population of the District.

In *Glasser* v. *U. S.*, 315 U.S. 60, 85, the court said:

> "Jurors in a federal court are to have the qualifications of those in the highest court of the State, and they are to be selected by the clerk of the court and a jury commissioner . . . This duty of selection may not be delegated . . . And, its exercise must always accord with the fact that the proper functioning of the jury system, and indeed, our democracy itself, requires that the jury be a 'body truly representative of the community', and not the organ of any special group or class.
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> "The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high-principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations, from training or otherwise, acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard-won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions."

The standards to be employed for the selection of jurors stated in the *Glasser* case were reiterated in *Thiel* v. *Southern Pacific Company*, 328 U.S. 217, and *Ballard* v. *U. S.*, 329 U.S. 187.

The method of the selection of jurors in the Northern District of Illinois, Eastern Division, violates the requirements of jury trial as recognized by this Court in the *Glasser* case. The choosing of jurors from recommendations of former jurors or from selected organizational lists results in a systematic exclusion of many hundreds of thou-

sands of eligible persons. The selection of jurors from persons recommended by former jurors limits the choice to a small self-perpetuating group. The selection by the clerk of jurors recommended by the personnel of the United States Attorney's office would procure a panel favoring the prosecution.

Title 28, U.S.C. Section 1861 provided (as it read at the time of the selection of the jury in this case) that jurors selected must be competent to serve as jurors under the laws of the State in which the district court is held. The jurors selected as volunteers were not competent to serve as jurors under the Statutes of Illinois. Chapter 78, Section 13 Illinois Revised Statutes provides that any person who seeks the position of a juror shall be deemed guilty of contempt and fined not exceeding twenty dollars.

The use of lists of private organizations although condemned in the *Glasser* case has not been changed. Any given panel of prospective jurors should be selected from lists of names impartially drawn and not from lists supplied by organizational groups. All qualified persons in every stratum of society must be eligible to serve as jurors. The Clerk should not arbitrarily limit eligibility for jury service, nor should it be delegated to heads of organizations to decide which persons are eligible. And there is the ever present possibility that a Clerk or an organization head might intentionally or unintentionally exclude from jury service large groups which should not be excluded.

The Court of Appeals completely ignored the dictum of the *Glasser* case that the selection of jurors from particular private organizations does not conform to the traditional requirements of trial by jury. It further ignored the evidence and based its opinion on the completely self-serving statement of the Clerk that he did not discriminate

against any economic, social, religious, racial, political or geographical group. This conclusion by the Clerk cannot be considered to be correct when viewed in the light of his other testimony which proves conclusively that his method of selecting jurors did discriminate against the overwhelming majority of the population of the Northern District of Illinois.

The opinion of the Court of Appeals, where it holds that volunteer jurors must be challenged for cause upon *voir dire,* is contrary to the holdings of this court in the case of *Thiel* v. *Southern Pacific Company,* 328 U.S. 217. In the *Thiel* case it was expressly held that it is immaterial that the jury which actually decided the factual issue in the case conformed or did not conform to the requirement that it represent a true cross-section of the community. The evil lies in the wholesale exclusion of the majority of the population of the district from jury service. See also *Dow* v. *Carnegie Illinois Steel Corporation,* (3 Cir., 1955) 224 F. 2d 414, where the United States Court of Appeals for the Third Circuit directed that the use of volunteers on juries be abolished.

The Court may, we believe take judicial notice of the fact that there are numerous cases now pending in the United States District Court for the Northern District of Illinois, Eastern Division, in which the identical problem has been raised. A decision in this case would alleviate the necessity for the question to be litigated over and over again in the District Court and the United States Court of Appeals for the Seventh Circuit. An informal communication from the Clerk indicates that he has been called to testify in five such cases and that there are an unspecified number of cases in which similar challenges to the array of petit jurors have been made by defendants in which a stipulation has been entered into between

counsel that the testimony of the Clerk of the United States Court would be the same as in the present case.

There is no case in which this Court has decided the precise question presented here. The *Glasser* case contained a dictum as to the use of jurors from selected organizations, the *Thiel* case concerned the exclusion of daily wage earners and the *Ballard* case concerned the exclusion of women from jury service. We believe that it is important to the administration of justice that this Court should grant our petition for writ of certiorari in order that it may review this question.

CONCLUSION.

For the above and foregoing reason we respectfully pray that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above cause.

Respectfully submitted,

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On the Brief.

APPENDIX I.

In the

United States Court of Appeals

For the Seventh Circuit

No. 12699 SEPTEMBER TERM 1957 - JANUARY SESSION 1958

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
GRANT W. SMITH,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois.

February 27, 1958

Before MAJOR, SCHNACKENBERG and PARKINSON,
Circuit Judges.

PARKINSON, *Circuit Judge.* The defendant was charged in a two count indictment with violations of the White-Slave Traffic Act, Title 18 U.S.C.A. § 2422. Count One charged a violation on or about January 31, 1957 and Count Two on or about February 28, 1957.

Trial was to a jury resulting in a general verdict of guilty. The Court entered judgment on the verdict and sentenced the defendant to five years on Count One and five years on Count Two, the sentences to run concurrently. This appeal followed.

The defendant seeks reversal on the grounds that the trial court erred in overruling his challenge to the array; insufficiency of the evidence to support the verdict; that the opening statement of the United States Attorney to the jury prejudiced defendant's right to a fair trial, and error of the trial court in refusing to grant the defendant a new trial because of false testimony.

The challenge to the array was grounded on alleged illegality in the selection and drawing of the jurors. The defendant attempted to prove that the jury officials failed to select jurors representing a cross-section of the community. The Clerk of the Court was the only witness offered by the defendant to so prove. He testified as to the method employed and stated without equivocation that no economic, social, religious, racial, political or geographical group was excluded. The defendant failed completely to sustain his contention. This was fatal to his challenge to the array. *Glasser* v. *U. S.*, 1942, 315 U.S. 60, 87.

The evidence did show that names of volunteers were included. However, there was no evidence that there were any volunteers on the panel summoned in this case. Even if there were it would not constitute a good ground for a challenge to the array because the entire panel would not be affected. Any legally disqualified juror on the panel could have been eliminated on a challenge for cause. There is no showing that any such challenge was made and overruled by the trial court.

The defendant failed to prove any vitiating defect or irregularity in the selection, drawing or impaneling of the jury and the trial court committed no error in denying the challenge to the array.

The contention of the defendant that the evidence is insufficient to support the verdict must be viewed against the backdrop of certain well settled rules of law. First,

we can not resolve conflicts in the evidence nor inquire into the credibility of the witnesses and are required to sustain the verdict if there is substantial evidence, taking the view most favorable to the government, to support it. *U. S.* v. *Green*, 7 Cir., 1957, 246 F. 2d 155, 157. Second, a verdict of guilty will be sustained if based on more than one count of an indictment and is valid as to any one of the counts. *U. S.* v. *Trenton Potteries Company*, 1926, 273 U.S. 392, 402. Third, a judgment thereon will not be reversed where the sentences on the counts are for equal terms and are to run concurrently. *Maddelin* v. *U. S.*, 7 Cir., 1931, 46 F. 2d 266, 269; *Kramer* v. *U. S.* 9 Cir., 1945, 147 F. 2d 202.

The evidence, when viewed in its aspects most favorable to the government, is that Mae Frances Norwood, also known as Faye Jackson and Louise Young, is a prostitute and that she and the defedant met for the first time at the Pershing Hotel in Chicago several months prior to the trial. Meeting a week or two thereafter, they had drinks together and she decided to be his "girl friend" and that association continued for four or five months. On or about January 30, 1957, after talking with some of her girl friends, she decided to go to Waynesville, Missouri with them. She called the defendant by telephone and asked his permission. He said it was "O.K." with him and he told her to come over to his house and get the money for the trip. She did so and the defendant gave her $15.00. She and Joanne, another prostitute, then went to the Pershing Hotel and got Bertha, another girl who was going with them, and the three of them took an Illinois Central train to Saint Louis, Missouri. After stopping at the house of Bertha's mother in Saint Louis they took the bus to Waynesville and went to the Cactus Club

where she engaged in acts of prostitution that night for which she received $219, of which she gave $195 to the defendant upon her return to Chicago.

On or about February 27, 1957 she and the defendant had a conversation, in the apartment the defendant had for her, concerning her return to Waynesville and she testified "[W]ell, he just told me, at least we were talking about it, going back to Waynesville, because he said there wasn't any money in Chicago, and that was a nice time to go by myself, and he said it would be all right for me to go by myself, and he give me money to go." The defendant gave her $20.00 and she went again committing acts of prostitution for which she received $175. She sent $100 of this amount by Western Union to the defendant from Saint Louis. She later returned to Chicago and had a conversation with the defendant in her apartment. An argument ensued resulting in a fight in which she was hit by a bottle thrown at her by the defendant causing a serious face wound.

The evidence, therefore, establishes that on February 27, 1957, the relationship of prostitute and panderer existed between the Norwood woman and the defendant. The defendant gave the Norwood woman the money to go from Illinois to Missouri by common carrier for the purpose of prostitution on January 30, 1957. She returned to Chicago and gave the defendant $195 of the $219 earned by her acts of prostitution in Missouri. Although we agree that the evidence was insufficient to support the verdict on Count One of the indictment such is not the case of Count Two.

The jury had the right to draw the inference from the conversation of February 27, 1957 that what the defendant was talking about was that "there wasn't any money in

Chicago" in her business of prostitution. There is no other reasonable inference to be drawn. She went to Waynesville, Missouri immediately thereafter on the money furnished by the defendant for the purpose of prostitution.

The evidence proves that the Norwood woman went from Chicago, Illinois to Waynesville, Missouri as charged in Count Two of the indictment and that she did so because of the defendant's express desire and inducement. Webster's New International Dictionary, Second Edition Unabridged 1958, defines induce to lead on; to influence; to prevail on; to move by persuasion or influence. The defendant induced her to go for the purpose of prostitution and furnished the money therefor. The proof, therefore, was sufficient to justify the submission of the issue on Count Two of the indictment to the jury. *U. S.* v. *Barton*, 2 Cir., 1943, 134 F. 2d 484.

The defendant complains of portions of the opening statement to the jury by the United States Attorney whereby he claims he was prejudiced in his right to a fair trial. In his opening statement Mr. Connelly, the prosecutor, told the jury what he believed the evidence would show and it did not do so in some particulars. It has been held that the failure of the district attorney to sustain his opening statements could not be prejudicial to the defendant but rather to the government. *Nichamin* v. *U. S.*, 6 Cir., 1920, 263 F. 880.

In his summation to the jury counsel for the defendant said:

> "He has a right to say what he thinks the evidence might disclose, but you can't convict a defendant on the prosecutor's opening statement. You must find your verdict solely upon the evidence that was introduced in this case, and what does the evidence show?

> Mr. Connelly, and I think he is a very fine gentleman, as he is fair and has done the best he could with what I think is a very bad case for the government, * * *."

The defendant is in no position to now contend that the prosecutor was unfair or was acting in bad faith. The record is to the contrary. Counsel for the defendant said in open court that the prosecutor was fair and had the right to do the very thing about which the defendant would now complain. Under such circumstances we cannot say that the declarations, admittedly made by the prosecutor in good faith, amounted to misconduct and constituted reversible error. *U. S.* v. *Lanza*, 2 Cir., 1936, 85 F. 2d 544; *U. S.* v. *Moran*, 2 Cir., 1952, 194 F. 2d 623.

The remaining contention of the defendant that "the court erred in refusing to grant defendant a new trial where it was shown that the government's witness committed perjury" completely collapses because the ineffectual affidavit of Faye Jackson does not in any manner show that her testimony should be discredited.

A motion for new trial is addressed to the sound discretion of the trial court and its action thereon will not be reviewed on appeal except in the case of a clear abuse of such discretion. *Apodaca* v. *U. S.*, 10 Cir., 1951, 188 F. 2d 932; *Adams* v. *U. S.*, 9 Cir., 1951, 191 F. 2d 206.

The trial judge heard the evidence introduced at the trial and had before him the affidavit attached to the supplementary motion for new trial. Counsel for the defendant informed the Court on the hearing on the motion for new trial that "I feel as Mr. Connelly does that these recantations are to be looked upon with suspicion." Even if the affidavit had stated a clear denial of the affiant's testimony the trial judge said in denying a new trial:

"If I were not sure that the jury were right I would give him a new trial, but I am sure they were right. I am sure that he is living off the earnings of this woman, and I am sure that he induced her to change her story."

We are satisfied that the trial court did not abuse its discretion and committed no error in denying the defendant a new trial.

The judgment as to Count One of the indictment is reversed and as to Count Two of the indictment the judgment is affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.